UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

AHMAD HEYDAR, Plaintiff, v. WESTPORT INSURANCE CORPORATION, and Does 1-50, inclusive, Defendants.	CV 03-2541 SVW (MANx) ORDER GRANTING DEFENDANT WESTPORT INSURANCE CORPORATION'S MOTION FOR SUMMARY JUDGMENT

TO ALL PARTIES AND THEIR ATTORNEYS OF RECORD:

I. INTRODUCTION/FACTUAL & PROCEDURAL HISTORY

Originally filed in California Superior Court on March 7, 2003, this action seeks damages, indemnification, and declaratory relief. This action primarily concerns the question of whether Defendant Westport Insurance Corporation ("Westport") has a duty to defend Plaintiff Ahmad Heydar ("Heydar") in another lawsuit that has been brought in state court ("underlying lawsuit").

Heydar is a licensed structural engineer who purchased two professional liability insurance policies from Westport, one for 2000-01 and a second for 2001-02. In 1997, Heydar prepared structural engineering drawings for a house, which was built in 1999 and 2000 using his plans. On May 30, 2001, following a rainstorm during which water entered the house, Ronald and Doreen Topper ("Toppers"), to whom

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Heydar had sold the house in 2000, filed a complaint ("original complaint") in California state court alleging various causes of action against Heydar and other defendants involved in the construction and sale of the Topper residence. Heydar, apparently believing the original complaint made no allegations of professional structural engineering negligence and instead focused on faulty construction and installation of windows and sliding glass doors, tendered the original complaint to his general commercial liability carriers rather than to Westport, his professional liability carrier. (Heydar Uncontroverted Facts ¶ 42.[1])

While repairing the water damage, the Toppers discovered professional structural engineering defects. They communicated allegations of these defects to Heydar in January 2002, and on January 23, 2002, Heydar first reported the Topper suit to Westport. On March 20, 2002, the Toppers filed an amended complaint that Heydar contends for the first time included a cause of action for professional structural engineering negligence against him.

Heydar sought coverage under his insurance policy from Westport, but Westport denied this coverage. As a result, Heydar filed this action for breach of contract, insurance bad faith, and declaratory relief in state court on March 7, 2003. Westport filed a Notice of Removal pursuant to 28 U.S.C. § 1441 on April 10, 2003. This Court has original diversity jurisdiction under 28 U.S.C. § 1332.

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[1] Heydar says he believed he had commercial general liability coverage, either directly or as a named additional insured. For example, he thought he was a named additional insured on the insurance policy of the general contractor who built the house and would be defended under that policy. Heydar Decl. ¶ 9.

On June 23, 2003, Westport filed a Motion for Summary Judgment seeking a ruling that coverage is not available to Heydar in the underlying lawsuit. On July 7, 2003, Heydar filed his Opposition to Westport's Motion for Summary Judgment as well as a Cross-Motion for Summary Adjudication on Defendant's Duty to Defend and Defendant's Duty to Indemnify in the underlying case. Along with these pleadings, Heydar filed a Response to Westport's Statement of Uncontroverted Facts as well as declarations in support of the facts Heydar alleged. On July 30, 2003, Westport filed a Motion to Stay the action until the underlying lawsuit was resolved. And on August 29, 2003, in light of the facts alleged in Heydar's July 27, 2003 filings, and the purported necessity for additional discovery to which they gave rise, Westport filed an Ex Parte Application for Additional Time to file its reply to Plaintiff's opposition and its opposition to Plaintiff's Cross-Motion for Summary Adjudication. On September 3, 2003, Heydar withdrew the duty to indemnify issue from his Motion for Summary Adjudication. The Court denied the Ex Parte Application for Additional Time at a hearing on September 9, 2003. The Court held a hearing on Westport's Motion for Summary Judgment on September 29, 2003, at which time the Court took the matter under submission. On October 15, 2003, the Court ordered further briefing on several matters. The Court, having considered all the briefing, and for the reasons set forth below, now GRANTS Westport's Motion for Summary Judgment on duty to defend.

II. SUMMARY OF ARGUMENTS

Westport seeks a ruling that coverage is not available to Heydar in the underlying lawsuit because (1) Heydar breached the notice provision of the 2000-01 Policy, which is a condition precedent to

coverage, and (2) no "claim" was first made against Heydar during the effective dates of the 2001-02 Policy.

Heydar argues that he is entitled to coverage under the 2001-02 policy because he promptly reported what he contends was the first claim of professional negligence against him. Heydar also argues that, even if the original complaint stated a claim for professional negligence, it was a distinct claim from the one alleged in the amended complaint such that the new claim is covered by the 2001-02 policy. Alternatively, Heydar argues that if the Court should find that the claim was first made during the 2000-01 policy period, Heydar should be covered under that earlier policy because the notice-prejudice rule should apply.

III. DISCUSSION

Westport denied coverage to Heydar because of Heydar's alleged failure to report the Toppers' professional negligence claim when it was made. The insurance policies at issue in this case were "claims made and reported" policies, meaning that the insured was covered for any claims made against him and reported during the policy period. The policies provided that "We shall pay on behalf of any insured all 'loss' in excess of the deductible which any insured becomes legally obligated to pay as a result of 'claims' first made against any insured during the 'policy period' and reported to us in writing during the 'policy period' or within sixty (60) days thereafter, by reason of any 'wrongful act' occurring on or after the 'retroactive date', [sic] if any." John Cummings Declaration ("Cummings Decl."), Exh. A, at 5. As a condition precedent to coverage, "if a 'claim' is made against any insured, the insured(s) shall, as soon as

practicable, but no later than sixty (60) days after termination of the 'policy period', [sic] provide written notice of the 'claim' to us." Id. at 6. Claim is defined as a "demand made upon you for loss, including, but not limited to, service of suit or institution of arbitration proceedings or administrative proceedings against you." Id. at 9.

A. 2000-01 Policy

Westport argues that Heydar cannot receive coverage under the 2000-01 policy because he did not report the claim within that policy's reporting period. While Heydar does not dispute his failure to report the claim within the 2000-01 policy's reporting period, he argues that the claim should still be covered under the 2000-01 policy because of the notice-prejudice rule. Under the notice-prejudice rule, an insurer cannot avoid coverage based on the insured's failure to provide timely notice unless that delay caused the insurer substantial prejudice.

The California Supreme Court has not ruled on whether the notice-prejudice rule applies to claims made policies. However, a number of other courts have considered this question. In Slater v. Lawyers' Mutual Insurance Co., 227 Cal. App. 3d 1415 (1991), the court held that the notice-prejudice rule, developed for "occurrence" policies, does not apply to claims made policies. Id. at 1422-24; but see id. at 1424 (Dissent of Johnson, J.) (citing cases applying the notice-prejudice rule to claims made policies). Occurrence policies, which are used for identifiable events like collision, fire, and war, are ill-suited for professional liability policies. Id. at 1422-23.

Underwriters soon realized, however, that "occurrence" policies were unrealistic in the context of professional malpractice because the injury and the negligence that caused it were often not discoverable until years after the delictual act or omission. In an effort to reduce their exposure to an unpredictable and lengthy "tail" of lawsuits filed years after the occurrence they agreed to protect against, underwriters shifted to the "claims made" policy. Id. at 1423, quoting Pacific Employers Ins. Co. v. Superior Court, 221 Cal. App. 3d 1348, 1357-58 (1990). Under claims made policies, the reporting of the claim is the event that triggers coverage. Id. In Slater and Pacific Employers, as in this case, the policies were ones in which "coverage does not attach unless the claim is made and reported to the insurer during the policy period." Pacific Employers, 221 Cal. App. 3d at 1357.

The Ninth Circuit, in Burns v. Int'l Ins. Co., 929 F.2d 1422 (9th Cir. 1991), elected to follow Pacific Employers. The court noted that there was conflicting authority concerning the question of applying the notice-prejudice rule to claims made policies. Id. at 1425. Nonetheless, the court found the Pacific Employers reasoning persuasive because the California Supreme Court declined to review Pacific Employers, and because applying the notice-prejudice rule would rewrite claims made policies, which are less expensive to the insured precisely because they reduce the insurance company's potential exposure. Id.

Other cases have found that the notice-prejudice rule applies to claims-made policies. For instance, in Northwestern Title Security Co. v. Flack, 6 Cal. App. 3d 134 (1970), the court noted that the

California Supreme Court cases propounding the notice-prejudice rule made no mention of such a distinction. Id. at 143-44. The Flack court did not engage in a thorough analysis of the reasons for claims made policies. But in Helfand v. Nat'l Union Fire Ins. Co., 10 Cal. App. 4th 869 (1992), a panel of the First District of the California Court of Appeal, the same district that decided Flack, rejected Flack and sided with Pacific Employers and Slater. Helfand, 10 Cal. App. 4th at 887-88.

Heydar attempts to distinguish this line of cases as being primarily concerned that applying the notice-prejudice rule to claims made policies would result in a free extension of the policy. See Slater, 227 Cal. App. 3d at 1423, citing Gulf Ins. Co. v. Dolan, Fertig and Curtis (Fla. 1983). The Slater court does note that the plaintiff in that case had the opportunity to purchase an extended reporting period endorsement, but he declined that offer. Id. at 1424. Heydar claims that the public policy that supports declining to extend the notice-prejudice rule to most claims made cases does not apply to him because he paid for extended coverage by purchasing a new policy the following year. Similarly, Heydar cites the language in Pacific Employers that rejects that case's plaintiff's contention that, if the notice-prejudice rule is not applied to claims made and reported policies, then insureds will be forced to renew coverage: "Insureds are not held 'hostage' by a 'claims made and reported' provision. An insured has the option of either purchasing another 'claims made' policy from the initial insurer to extend the period of coverage, or purchasing a policy with retroactive coverage with another insurer." 221 Cal. App. 3d at 1360. Heydar claims that, by extending the policy, he has done just what the Pacific Employers

court suggested. In addition, one of two reasons the Ninth Circuit stated in Burns for following Pacific Employers was that "[t]o apply the notice-prejudice rule to a claims-made policy would be to rewrite the policy, extending the policy's coverage at no cost to the insured." Id. at 1425.

The Court declines to apply the notice-prejudice rule in the way Heydar has urged. While there is an argument that the rationale for excluding claims made policyholders from the protections of the notice-prejudice rule falls away where the insured purchases extended coverage, the Court need not decide that question here because Heydar did not buy extended coverage. When Heydar purchased the second policy with Westport, he did not purchase an extended reporting period for his first policy; nor was he ever told that purchasing a second policy would havethe effect of extending his previous coverage. The 2000-01 policy only covered Heydar for claims that were made and reported during the policy period; Heydar failed to report the claim and, as a result, may not receive coverage.

B. 2001-02 Policy

Westport argues that Heydar cannot obtain coverage under the 2001-02 policy because no claim was made against Heydar during that period. It is first necessary to determine whether the original complaint stated a claim against Heydar for professional negligence. If so, the Court must then decide whether the claim alleged in the amended complaint is related to the claim alleged in the first complaint such that failure to report the original complaint precludes coverage for the claim in the amended complaint.

1. The Original Complaint

The first issue for resolution regarding coverage under the 2001-02 policy is whether the original complaint made a claim against Heydar under the insurance policy's definition of claim. Considering the complaint on its face, it does state a claim against Heydar for professional negligence in his capacity as a structural engineer. It is true that the original complaint does not use the specific words "professional negligence" against Heydar. Nonetheless, there is sufficient language in the original complaint to indicate that such a claim was being made. For instance, the original complaint alleges that "Heydar was involved in the construction and sale of the Topper Residence to Plaintiffs." Original Complaint (OC) ¶ 2. In addition, the original complaint alleges that "defendants Heydar, Farid, Rezai and Does 1 through 5, inclusive ..., and each of them, were ... , in some manner or fashion between them, ... developers, owners, contractors, subcontractors, architects, engineers, builders, and sellers of the Topper Residence." OC ¶ 11.[2] The complaint further alleged that "In the application for the building permit, Heydar represented ... that Heydar was acting as the architect or engineer for the construction of Topper Residence," OC ¶ 13; that the defect at issue arose from "deficiencies in the design, specification,

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[2] The original complaint also indicated that it could be amended to make specific allegations as to liability for engineering defects: "Plaintiffs are unaware of the precise and exact nature of the relationship between the Developer Defendants [including Heydar] and the part each played in the acquisition, design, planning, development, construction and sale of the Topper Residence, but when the true and precise nature of their participation and relationship become known, this pleading will be amended to reflect the same or it will be established at the time of trial, according to proof." OC ¶ 11.

materials, planning, supervision, observation of construction, and/or development of the Topper Residence," OC ¶ 18; and that the Toppers "relied upon the skill, knowledge, and expertise of the Developer Defendants ... in their participation in the process of the design, planning, development, construction, and/or sale of the Topper Residence," OC ¶ 24.

Given these allegations, the Court concludes that the original complaint did state a claim for professional negligence. Heydar urges this Court to find otherwise on the basis of the apparent communications between Heydar (or Leila Nourani, his former counsel in the underlying lawsuit) and Robb Strom, the Toppers' attorney in the underlying lawsuit. Heydar says that Strom told him that "[Strom] believed the leaks were caused by negligent installation and defective products, referring to the windows and installation of the windows and sliding doors, and possibly defective products." Heydar Decl. ¶ 7. Similarly, in Strom's declaration, he notes that in the numerous conversations he had with Ms. Nourani in 2001 about the lawsuit, Strom at no time indicated that the Toppers were alleging any professional negligence against Heydar. Strom Decl. ¶¶ 3-5. Strom apparently believed that the water intrusion "was primarily[3] caused by both the negligent installation of windows and/or sliding doors, and by product defects of some of the sliding doors themselves," which "are not structural engineering issues." Id. at ¶¶ 4-5. This extrinsic evidence is insufficient to support the view that there was no claim for professional negligence in the original complaint; Strom never

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[3] In stating his belief that the negligent installation of the windows and doors and product defects were the primary causes of the water intrusion, Strom does not eliminate the possibility that structural engineering negligence was one cause.

made any affirmative representations, either during the contemporaneous conversations or in his after the fact declaration, that the complaint did not allege professional negligence against Heydar. Furthermore, even if this evidence would tend to indicate that the Toppers were not making professional negligence allegations against Heydar in the original complaint, they are irrelevant to the question of whether such a claim was made in the original complaint.

Westport argues that extrinsic evidence is inadmissible on the question of whether a claim was made because the definition of the word "claim" is unambiguous. The policy defines "claim" as "a demand made upon you for loss, including, but not limited to, service of suit or institution of arbitration proceedings or administrative proceedings against you." Cummings Decl., Exh. A, at 9.

In Hill v. Physicians & Surgeons Exchange of California, the Fourth District Court of Appeal found that extrinsic facts were inadmissible to determine whether a claim had been made because the claims-made policy language and the definition of claim were unambiguous. Id. at 6. In that case, the underlying lawsuit involved a patient who was unhappy with the surgery her insured doctor performed on her shoulder. Though the underlying plaintiff expressed her dissatisfaction with her doctor, she did not file a lawsuit or make any demand for compensation until after the insured doctor's policy period expired. As a result, no claim had been made and the insurer had no duty to defend. Id. Similarly, because the definition of claim in the Westport policy is unambiguous, extrinsic evidence is inadmissible here to determine whether the Toppers' original complaint stated a claim.

Heydar, however, argues that when Westport received his tender in January 2002, Westport had an obligation to investigate whether there was a potential for coverage. According to Heydar, this obligation included a duty to consider extrinsic evidence regarding whether the FAC presented claims that were not in the original complaint. Unless Westport considered these extrinsic facts, it could not refuse to defend Heydar against the allegations in the FAC. It is well-settled California law that "evidence extrinsic to the underlying complaint can defeat ... a defense duty." Montrose Chem. Corp. v. Superior Court, 6 Cal.4th 287, 291 (1993). Heydar contends that Montrose is not limited to extrinsic evidence the insurer produces; rather, the insured as well must be able to produce extrinsic facts that bear on the defense duty. Heydar notes a passage in Montrose where the court said that insurers will not be obligated to defend based on the insured's "mere assertions that coverage may exist ... because, as in summary judgment proceedings generally, an insured cannot manufacture a dispute on summary judgment, ipse dixit, by refusing to concede the truth of a fact without adducing some evidentiary support for its position." 6 Cal.4th at 300-01. Heydar claims that this language indicates that the insured would be able to present extrinsic evidence to support his claim for coverage.

But these arguments do not go to the heart of the issue, which is whether this evidence may be considered in determining whether a claim was made in the original complaint.[4] Montrose is a case about the duty

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[4] Heydar's position also places an outrageous burden on the insurer. In essence, Heydar argues that notwithstanding allegations in the complaint that should have put him on notice that a claim for professional negligence was made, the defendant was obligated to follow up to see if those claims were real.

to defend; as such, it does not control in this situation, where the only question is whether the original complaint stated a claim for professional negligence. Where, as here, a claims based policy is at issue, the determination of whether a claim is stated is far more mechanical than the duty to defend determination. The insurance policy defines claim broadly and makes reporting a claim a condition precedent to coverage for that claim. The insured's role is to report the claim, not to anticipate whether the insurer will owe a duty to defend.

Heydar invokes the "Hobson's choice" with which he was faced as a result of the duty to report a claim he felt Westport would not defend.

> Assum[e] Heydar is correct and there were, in fact, no allegations of professional engineering negligence that existed at the time of the original complaint. According to Westport, Heydar would have had to tender the claim even though coverage would have ultimately been denied. His reward for reporting this non-covered claim would be to risk increased premiums, or face the possibility that his policy would not be renewed because he asserted a claim.

(Pl.'s Supp. Br. at 4.) Heydar notes that Westport did, in fact, refuse to renew his policy following the 2001-02 policy year. In other words Heydar, even if he recognized that the original complaint stated a claim on its face, did not want to report a claim that, because of the extrinsic facts of which he was aware, he believed would ultimately be denied. To be sure, such reporting does carry risks. But, by not reporting the claim, Heydar bore another risk - that if the claim was in fact covered by his professional negligence

policy with Westport, he would not be able to obtain coverage unless he reported the claim during the policy period. Heydar chose not to report the Toppers' original complaint; as a result, he cannot obtain coverage for the claims made in that original complaint. Heydar was under no obligation to report the complaint to his insurer, but he cannot receive coverage if he failed to so report.

Because the term claim is unambiguous, extrinsic evidence is inadmissible to determine whether the original complaint made a claim. In any event the extrinsic evidence proffered does not support Heydar's position that no professional negligence claim was made. The original complaint made a claim against Heydar for professional engineering negligence.

2. First Amended Complaint

Even if there was a covered claim against Heydar in the original complaint, it may be distinct from the claim in the amended complaint. Westport, however, argues that the amended complaint states the same claim for professional negligence that was stated in the original complaint. Alternatively, Westport argues that, even if the claims are distinct, they are related such that they are treated as a single claim under the policy.

a. The two complaints make very similar allegations.

Westport argues that the amended complaint states substantially the same allegations as does the original complaint. As a result, Westport argues, the amended complaint embodies the same professional negligence claim as does the original complaint, a claim that was made

at the time of the original complaint. Therefore, Heydar cannot receive coverage under the 2001-02 policy.

Heydar contends that the amended complaint contains allegations different from those in the original complaint because it, for the first time, makes the following allegations against Heydar:

(1) "Heydar acted as the structural engineer of record for the construction of the Topper Residence." (FAC ¶ 42.)

(2) "[Heydar] prepared structural plans and calculations in connection with his work as structural engineer." (FAC ¶ 42.)

(3) "By virtue of his role as structural engineer, Heydar owed Plaintiffs a duty of care to act in accordance with the Building Code and the laws of the State of California relating to structural engineers." (FAC ¶ 42.)

(4) "Heydar failed to design and/or construct the structural components of the Topper Residence in accordance with the Building Code and the laws of the State of California ..., omitting to use required 'hold downs,' and causing framing to be insufficiently designed and constructed to carry the structural loads placed upon it." (FAC ¶ 44.)

(5) "As a direct and proximate result of the breaches of duty of Heydar ..., Plaintiffs ... have suffered damage[s]." (FAC ¶ 45.)

Numbers (1), (2), and (3) are merely general allegations regarding Heydar's role as structural engineer. Though Heydar disputes it, this Court has already determined that the original complaint contained allegations of structural engineering negligence against Heydar. (See supra Part III.B.1.) The original complaint mentioned Heydar's role as engineer. (See, e.g., OC ¶¶ 11, 13.) Thus, the allegations in the amended complaint that Heydar was the

structural engineer of record and owed a duty as such add nothing to the allegations in the original complaint. Nor does number (5) add anything new, as the original complaint alleges damages. (See OC ¶¶ 19, 26, 32, prayer.)

Thus, it is only number (4), with its allegations regarding hold downs and framing, that could possibly say something new. But Westport argues that even these allegations merely restate those in the original complaint. Westport points to paragraph 18 of the original complaint, which alleges that "the above-described defects arose out of, or were attributable to, and are directly and proximately caused by deficiencies in the design, specifications, materials, planning, supervision, observation of construction, construction, and/or development of the Topper Residence." (OC ¶ 18.) This language from the original complaint is similar to the language in the amended complaint in that it discusses design and construction deficiencies. But the two complaints describe those design and construction deficiencies differently. The original complaint alleges a number of defects arising out of the deficiencies, "including, but not limited to, defects in windows and doors and the manner of their installation, defects in exterior and interior finish work, defects in deck installation and waterproofing, defects in exterior stucco, defects in plumbing, defects in workmanship, and violations of applicable building code provisions." (OC ¶ 15.) The amended complaint, on the other hand, specifically refers to "omitting to use required 'hold downs,' and causing framing to be insufficiently designed and constructed to carry the structural loads placed upon it." (OC ¶ 44.) While the two complaints contain different specifics, these differences are largely insignificant because they

merely describe design and construction deficiencies differently. Moreover, the Court need not conclusively decide this question because even accepting the argument that the allegations in the amended complaint differ from those in the original complaint, Westport must prevail on two alternative bases: the complaints assert only one primary right, and the claims arise out of a series of related wrongful acts.

b. The two complaints state a single claim because only one primary right is invoked.

The seminal California case regarding whether multiple acts, errors, or omissions constitute multiple claims or only a single claim is Bay Cities Paving & Grading, Inc. v. Lawyers' Mut. Ins. Co., 5 Cal.4th 854 (1993). In Bay Cities, an attorney had a professional liability insurance policy that limited coverage to a maximum of $250,000 "for each claim." Id. at 857. The plaintiff, Bay Cities, was unable to collect money it was owed from a construction project. The insured attorney filed a mechanic's lien, but failed to foreclose the mechanic's lien or to serve a stop notice on the project's construction lenders. Id. at 858. Bay Cities argued that these acts gave rise to two claims for malpractice, but the court held that Bay Cities had only one claim because the two acts of malpractice gave rise to only one injury, Bay Cities' failure to collect what it was owed. Id. at 860.

Heydar notes the primary rights theory underlying the Bay Cities holding.

California has consistently applied the primary rights theory, under which the invasion of one primary right gives

> rise to a single cause of action. Bay Cities had one primary right - the right to be free of negligence by its attorney in connection with the particular debt collection for which he was retained.

Id. (internal citations and quotation marks omitted); but see id. at 873 (Kennard, J., concurring) (noting that the primary rights doctrine concerns pleadings, which are different from insurance claims, and that "the determination of rights under an insurance policy is a question of contract law"). Heydar further argues that, while the primary right at issue in Bay Cities encompassed both acts of negligence by the attorney, the primary right was defined narrowly. The primary right was not to be free of all negligence by the attorney, but rather to be free of negligence in this particular debt collection. Thus, Heydar argues that the primary right in this case should not be defined as broadly as the Toppers' right to be free of structural engineering negligence in the construction of their home.

Heydar cites Winston Square Homeowner's Assoc. v. Centex West, Inc., 213 Cal. App. 3d 282 (1989), for the proposition that construction defects do not necessarily merge into one primary right. In Winston Square, the plaintiffs were the owners of a townhouse development who had suffered a number of construction defects, namely drainage, plastering, gutters and downspouts, chimney crickets, valley gutters, trim boards, and balcony railings. Id. at 286. The court held a bifurcated trial, where the first part dealt only with the question of statute of limitations. Id. The plaintiffs alleged that the statute of limitations had been tolled by the defendant's attempts to repair the defects. Id. The trial court held that the statute of limitations had been tolled with respect to all but the drainage

defects. Id. at 286-87. On appeal, the plaintiffs challenged the trial court's application of the statute of limitations to separate areas of damage. Id. at 287. "Winston Square [plaintiffs] contends it has one cause of action, for damages caused by the faulty construction and design of the townhouse units, and the statute of limitations must be applied uniformly to that single cause of action." Id. The plaintiffs invoked California's primary right theory and argued that the defendant invaded only one primary right - the right to homes and grounds free of defects. Id. The appellate court upheld the trial court's finding, noting that "applying the definition of 'cause of action' strictly, one could probably set forth three causes of action - one for drainage defects, one for defects causing water intrusion in the townhouse units, and one for defective balcony railings." Id. at 289. Thus, the primary right theory was not so broad as to encompass every construction defect. But neither was the primary right theory so narrow as to designate a separate primary right for each type of defect; e.g., plastering and gutters were not two separate primary rights.

Here, Heydar argues that the two complaints assert different primary rights as the original complaint was concerned only with water damage, while the amended complaint makes allegations of vertical loading defects. But Heydar is reading in precision where there is none. The original complaint never says that it is only alleging defects related to water intrusion. Instead, it provides a nonexclusive list of defects and problems that includes such generic terms as "defects in workmanship" and "violations of applicable building code provisions." (OC ¶ 15.) Moreover, the amended complaint alleges that Heydar breached his duty of care "by failing to

design and/or construct the Topper Residence in a safe and workmanlike manner." (FAC ¶ 44.) It is clear from this language that the primary right being asserted by the Toppers in their amended complaint is the right to a residence that was designed and constructed in a safe and workmanlike manner. When read in context, it becomes clear that the discussion of hold downs and framing is merely an explanation of the ways in which Heydar failed to satisfy this primary right:

> Heydar ... breached [his] duty of care by failing to design and/or construct the Topper Residence in a safe and workmanlike manner. Specifically, Heydar failed to design and/or construct the structural components of the Topper Residence in accordance with the Building Code and the laws of the State of California pertaining to structural engineers in a safe and workmanlike manner, instead omitting to use required "hold downs," and causing framing to be insufficiently designed and constructed to carry the structural loads placed upon it.

(FAC ¶ 44.) This same primary right was asserted in the original complaint, which attributes the alleged defects, including defects in workmanship and building code violations, to "deficiencies in the design, specifications, materials, planning, supervision, observation of construction, construction, and/or development of the Topper residence." (OC ¶ 18). Heydar's attempts to paint the original complaint as one alleging water intrusion defects only and the amended complaint as one for the first time focusing on vertical loading defy the plain language of the two complaints, both of which contain fairly general allegations that Heydar violated their right to a home constructed in a safe and workmanlike manner.

Because the original complaint and the amended complaint assert the same primary right, the two complaints state only one claim against Heydar. That claim was first made when the original complaint was filed; therefore, Heydar cannot obtain coverage under the 2001-02 policy because no claim was first made against him during that policy period.

c. Alternatively, the claims arise out of a series of related wrong acts.

Even if the Court had not found that the two complaints stated only one claim, it would still be possible to treat the multiple claims as one if they were related. Condition J of the policy provides that:

> Two or more "claims" arising out of a single "wrongful act," or a series of related or continuing "wrong acts," shall be a single "claim." All such "claims" whenever made shall be considered first made on the date on which the earliest "claim" was first made arising out of such "wrongful act," and such "claims" are subject to one "Per Claim Limit Liability" and deductible.

Thus, the relevant question is whether the claims arose out of a single wrongful act or a series of related or continuing wrong acts.[5]

Heydar first argues that Condition J is inapplicable to these facts because it only applies when multiple claims are made during the same policy period. Heydar cites Homestead Insurance Co. v. American

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[5] The policy defines "wrongful act" as "any actual or alleged negligent act, error or omission in the performance of 'professional services' for others by an insured ...." Id. at 12.

Empire Surplus Lines Insurance Co., 44 Cal. App. 4th 1297 (1996) extensively for this proposition. In Homestead, the insured (Verdugo) was sued for the same conduct in two different lawsuits. The first lawsuit, the Minnick suit, was filed during the policy period for a claims made policy Verdugo had been issued by American Empire. The second lawsuit, the McLeod suit, was filed during the policy period for a claims made policy issued to Verdugo by Homestead. American Empire refused to defend the McLeod suit, but Homestead defended it. Homestead claimed that, because the American Empire policy included in its definition of claim that "Claims arising out of the same act or out of a series of interrelated acts shall be considered as arising out of one negligent act, error or omission and shall be treated as a single claim," the two lawsuits, which involved interrelated acts, should be treated as a single claim under the American Empire policy. Id. at 1303. However, the Homestead court found that the claims made nature of the policy, which provided that American Empire would only pay for loss for which the insured became legally obligated to pay "from any claim made against the Insured during the Policy Period," trumped the definition of claim to the extent that the definition conflicted with the timing requirements. Id. at 1305. In reaching this conclusion, the court relied heavily on the underlying rationale for claims made policies, which is to allow insurers to predict "both the limits of their exposure and the premium needed to accommodate the risk undertaken." Id. at 1304.

But Heydar fails to note a crucial difference between the policy language in Homestead and the language here. The language of Condition J, unlike the related claims language in Homestead, speaks directly to the timing of the making of the claim. "All such 'claims'

whenever made shall be considered first made on the date on which the earliest 'claim' was first made arising out of such 'wrongful act.'" Thus, in agreeing to this policy language, the parties contemplated that related claims, even if filed after the policy period, would be considered first made at the time the earliest claim was made. This language would be nonsensical if interpreted to apply only to claims made within the same policy period. The precise date on which a claim is made is of no consequence to anyone so long as that date falls within the policy period. Thus, there would be no policy language discussing when a related claim was first made if it was not contemplated that related claims made during different policy periods would nonetheless be considered first made at the time of the earliest claim. Thus, Condition J is applicable to these facts and the Court now turns to applying it.

In Bay Cities, the appellate court, unlike the California Supreme Court after it, had determined that the plaintiff had, in fact, asserted two claims. 5 Cal.4th at 866. As a result, the dispositive question for that court was whether the claims were "related" under the policy, which provided that "Two or more claims arising out of a single act, error or omission or a series of related acts, errors or omissions shall be treated as a single claim." Id. at 857, 866. The California Supreme Court considered this question as well, analyzing whether the term related was ambiguous given the policy and the circumstances, and whether related meant only causally related or also encompassed logical relationships. The court held that the term was not ambiguous and that it was not limited to causal relationships. Id. at 873.

> The two errors by the attorney are "related" in multiple respects. They arose out of the same specific transaction, the collection of a single debt. They arose as to the same client. They were committed by the same attorney. They resulted in the same injury, loss of the debt. No objectively reasonable insured under this policy could have expected that he would be entitled to coverage for two claims under the policy.

Id. at 873. Westport argues that this case mirrors Bay Cities. Any structural engineering claims arose out of the same transaction, the construction of the house. They involved the same parties, the Toppers. And, Westport argues, they resulted in the same injury, a home with structural engineering defects. Even though both complaints lament Heydar's failure to design and construct the Topper residence in a safe and workmanlike manner, the injury question is a difficult one to answer at this juncture because the original complaint contained no recitation of facts and did not specify with precision the defects that were being alleged. Until the trial of the underlying case has been concluded, it will be difficult to know what injuries resulted from the alleged negligence.

But the injury question will not be crucial in every case. The Bay Cities court stressed that the question of whether "related" is ambiguous is a case-specific one. "The proper question is whether the word is ambiguous in the context of this policy and the circumstances of this case." 5 Cal.4th at 868. Though identity of injury was one factor in Bay Cities that rendered related unambiguous, the case does not stand for the proposition that such identity is a prerequisite to finding the term unambiguous.

Other courts have found related to be unambiguous in a number of situations. One example is Gregory v. Home Insurance Co., 876 F.2d 602 (7th Cir. 1989), a case the Bay Cities court found persuasive. See 5 Cal.4th at 872-73. Gregory involved a lawyer's various actions in connection with the marketing of a videotape investment program. The lawyer drafted a production service agreement and promissory note to be signed by each videotape buyer. He also drafted a tax and security opinion letter for his client advising that the videotapes were not securities and that buying the tapes would give the buyers tax advantages. 876 F.2d at 603. Claims were made against the lawyer by the buyers, alleging that the opinion letter misstated the tax consequences of buying the tapes, and by the client, alleging incorrect advice regarding the securities status and tax benefits of the tapes. Id. at 604. The Seventh Circuit found that the claims were related under the lawyer's insurance policy, which provided that "Two or more claims arising out of a single act, error, omission or personal injury or a series of related acts, errors, omissions or personal injuries shall be treated as a single claim." Id. In so doing, the court upheld the district court, who had found that "Gilbert's letter is but a written version of his advice that, structured this way, the offering was not a security." Id. at 605. Thus, even though the different claims in Gregory involved different claimants, the Seventh Circuit found that all the lawyer's actions in connection with the videotape offering were "'related' in any meaningful sense of the term." Id. at 605-06.

Another case in the Gregory/Bay Cities line is Continental Casualty Co. v. Wendt, 205 F.3d 1258 (11th Cir. 2000). That case involved yet another lawyer's connection with K.D. Trinh, a company

that sold promissory notes to investors through agents. Id. at 1259-60. In 1996, the lawyer was sued in a class action by K.D. Trinh investors for giving inaccurate legal advice, and for making false and misleading statements regarding the legality of K.D. Trinh investments as securities. Id. at 1260. In 1997, one of the agents who had sold K.D. Trinh's notes sued the lawyer for making misrepresentations about the investments' legality. Id. The lawyer's insurance policies had relatedness language as follows:

> Any claim or claims arising out of the same or related wrongful acts, shall be considered first made during the policy term in which the earliest claim arising out of such wrongful acts was made.

and

> the limit of liability stated for "each claim" is the maximum we will pay for all claims and claim expenses arising out of, or in connection with, the same or related wrongful acts. All such claims whenever made, shall be considered first made during the policy term in which the earliest claim arising out of such claim and related wrongful acts was made, and all such claims shall be subject to the same limit of liability.

Id. at 1260-61. Even though the claims involved different types of acts that caused different harms to different people, who had different causes of action against the lawyer, the Eleventh Circuit found that the acts were all related. The acts were all part of a course of conduct and all were aimed at the same goal, to encourage investment in K.D. Trinh's notes. Id. at 1264.

The case at bar does not fit neatly into any of these other cases. However, what these cases show is that claims can be found to be related under many different circumstances and for many different reasons. There is, of course, some limit. The Bay Cities court cautioned that not every logical relationship could satisfy the relatedness test. "At some point, a relationship between two claims, though perhaps 'logical,' might be so attenuated or unusual that an objectively reasonable insured could not have expected they would be treated as a single claim under the policy." 5 Cal.4th at 873; see also Gregory, 876 F.2d at 606 ("At some point, of course, a logical connection may be too tenuous reasonably to be called a relationship, and the rule of restrictive reading of broad language would come into play."). But the structural engineering claims here are so related that these concerns do not come into play. Any claims involve the same parties, Heydar and the Toppers. The claims involve the construction of the Topper house and the structural makeup thereof. Moreover, the claims were made in the same lawsuit with the same parties. Given these circumstances, as well as the original complaint's broad language regarding engineering, design, and construction defects, it could hardly come as a surprise to Heydar that the structural engineering claims in the amended complaint and in the original complaint will be treated as a series of related wrongful acts. Thus, the acts should be treated as one claim under Condition J. The structural engineering negligence claim was first made at the time of the original complaint.

IV. CONCLUSION

Heydar is not entitled to coverage under the 2000-01 policy because he did not report the claim during the reporting period and the notice-prejudice rule does not apply. Furthermore, Heydar is not entitled to coverage under the 2001-02 policy because no claim was first made against Heydar during the 2001-02 policy period. This conclusion is based on two alternative bases: first, there is only one claim against Heydar because the Toppers assert only one primary right, the right to a residence designed and constructed in a safe and workmanlike manner; or second, the claims are related such that they are treated as one claim. As Heydar is not entitled to coverage under either policy, Westport has no duty to defend him in the underlying lawsuit. Accordingly, Westport's Motion for Summary Judgment [17] is hereby GRANTED.

IT IS SO ORDERED.

DATED: 1/7/04

STEPHEN V. WILSON
UNITED STATES DISTRICT JUDGE